

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance under 47 U.S.C. §)	
160(c) from Application of the ISP Remand)	
Order)	

OPPOSITION TO TERMINATION OF PROCEEDING

Core Communications, Inc. (“Core”), by counsel, hereby opposes termination of the above-captioned proceeding. Public Notice, WC Docket No. 03-171 (Feb. 27, 2007) (“Public Notice”).¹

Argument

The Commission should not terminate this proceeding for two primary reasons. First, termination of this proceeding without resolution of Qwest Corporation’s (“Qwest’s”) pending reconsideration petition would unfairly prejudice Core and run contrary to Rule 41 of the Federal Rules of Civil Procedure, FED. R. CIV. P. 41, which the Commission has found instructive in the operation of its proceedings? Second, refusal by the Commission to resolve the “deemed granted” issues, which the Commission expressly has recognized make up the heart of Qwest’s pending reconsideration petition, would amount to a clear abdication of an

¹ On January 30, 2007, Core filed a timely Opposition to Qwest Corporation’s (“Qwest’s”) motion to withdraw its petition for reconsideration, **which the Commission must resolve before it could terminate this proceeding**. The Public Notice fails to reference in any way Core’s timely opposition to Qwest’s motion to resolve its petition for reconsideration, and that filing standing alone constitutes an opposition to terminating this proceeding.

² *Premiere Network Services, Inc. v. Southwest Bell Tel.*, 18 FCC Rcd 11474, 11475 (rel. June 11, 2003) (concluding that Rule 41(a)(2) of the Federal Rules of Civil Procedure is “instructive,” although not controlling) (“*Premiere*”).

“opportunity to pass” on those important issues and effectively waive any future claim by the Commission that section 405 of the Act, 47 U.S.C. § 405, preserves the Commission’s ability to address those issues in the first instance. Accordingly, the Commission should not terminate this proceeding; rather, it should immediately rule on the merits of Qwest’s longstanding petition for reconsideration.

I. As noted, the Commission rightly has recognized that Federal Rule of Civil Procedure 41 is instructive to Commission analysis of efforts by parties unilaterally to withdraw petitions. The policy underlying Rule 41 requires denying Qwest’s request to withdraw its petition and resolving that petition on the merits as requested in Core’s timely January 9, 2007 Opposition to Qwest’s motion. Any other result would unfairly prejudice Core.

In accordance with Rule 41(a)(1), a party may only withdraw a petition unilaterally if no other party has filed a responsive pleading. FED. R. CIV. P. 41(a)(1). Here, Qwest filed its petition for reconsideration on November 10, 2004, and, in the words of the Commission, Core “joined issue” with Qwest by filing a timely opposition to that petition on November 18, 2004. On January 9, 2007, Core requested that the Commission resolve Qwest’s reconsideration petition. In response, Qwest moved to withdraw its petition to avoid a decision on the merits on January 23, 2007, and on January 30, 2007, Core timely opposed Qwest’s effort to withdraw the very petition to which it had joined issue. Accordingly, it is incorrect for the Commission to suggest, as it does in the Public Notice, that “[t]here are no pending petitions for reconsideration” in this proceeding. Public Notice at 1.

Furthermore, any reasonable application of Rule 41(a)(2) or its underlying policies precludes the Commission from permitting Qwest to withdraw its petition for reconsideration. As the Commission specifically has recognized, “[t]he purpose of Rule 41(a)(2)

‘is primarily to prevent voluntary dismissals which unfairly affect the other side.’” *Premier* at 11475-76 (citing Wright & Miller, Federal Practice & Procedure: Civil 2d § 2364 (citing cases)). Regarding application of Rule 41(a)(2), the Commission noted as follows:

In determining whether to dismiss a complaint, courts generally follow the traditional principle that dismissal should be allowed unless the defendant will suffer some **plain legal prejudice** other than the mere prospect of a second law suit.

Id. at 11475 (emphasis added, citation omitted). Here, Core would suffer plain legal prejudice if the Commission were to permit Qwest withdraw its reconsideration petition and terminate this proceeding. As the Commission notes, Core relies on Qwest’s petition – to which Core timely joined issue. See Public Notice at n. 8. If Qwest were permitted to withdraw its long-pending petition, Core would be critically prejudiced, as there would “no longer [be] a timely filed petition for reconsideration pending before the Commission upon which Core may rely to raise its argument.” *Id.* This is precisely the kind of prejudice that Rule 41(a)(2) is designed to avoid. Accordingly, the Commission may neither permit Qwest to withdraw its petition nor terminate this proceeding.

11. Separately, termination of this proceeding without resolving Qwest’s petition for reconsideration on the merits would destroy any possible claim by the Commission that it has not had “an opportunity to pass,” within the meaning of 47 U.S.C. § 405, on whether or to what extent a forbearance petition is “deemed granted” when the Commission, as it did below, fails to take official agency action within the time period prescribed by Congress in section 10 of the Act, 47 U.S.C. § 160.

Indeed, at most, section 405 provides the Commission with “an opportunity to pass” on an issue. Section 405 by no means permits the Commission to refuse to address a reconsideration petition (to which another party has “joined issue”) for well over two years, and

then let a single party unilaterally withdraw the petition resulting in irreparable prejudice to another. Such a result would serve only to demonstrate the futility of the reconsideration process, justify the myriad judicial exceptions recognized to section 405's limited requirements, and highlight the need for the circuit courts to step in and resolve issues on which the Commission refuses to pass in spite of ample opportunities to do so.

Conclusion

Consistent with the discussion above, the Commission should continue this proceeding and resolve Qwest's petition for reconsideration on the merits.

Respectfully submitted,

/s/

Michael B. Hazzard
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 I Street, NW, Seventh Floor
Washington, D.C. 20005
(202) 467-6900 Phone
(202) 261-0035 Fax
mhazzard@wcsr.com

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